CASE NOTE

BARE V INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION[*]

ONE STEP FORWARD, ONE STEP BACK: THE VICTORIAN *CHARTER* IN *BARE V INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION*

JACK MAXWELL[†]

Bare v Independent Broad-Based Anti-Corruption Commission *is a landmark in the history of Victoria's* Charter of Human Rights and Responsibilities. *The Court of Appeal's recent decision has significant implications for future litigation under the* Charter. *First, while not binding on this point,* Bare *considered in detail whether a breach of s 38(1) of the* Charter *by a public authority constitutes a jurisdictional error. Second, the Court adopted a cautious approach to the use of international law to construe the scope of* Charter *rights. This departs from previous* Charter *case law. Third,* Bare *demonstrates the* Charter*'s power to have a normative influence on the behaviour of public authorities, by requiring them to give proper consideration to human rights. Finally,* Bare *illustrates how the* Administrative Law Act 1978 *(Vic) augments the* Charter*'s power as a human rights instrument.*

CONTENTS

[*] *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 326 ALR 198.

[†] BA (Hons), JD (Melb). A previous version of this article was submitted as part of coursework undertaken at Melbourne Law School, The University of Melbourne. I thank John Tobin for his enthusiasm and guidance, and Lucy Maxwell and the anonymous referees for their invaluable comments on earlier drafts. All views are my own.

I Introduction

Bare v Independent Broad-Based Anti-Corruption Commission ('*Bare*')[1] is the most significant case brought under the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') since the High Court's decision in *Momcilovic v The Queen* ('*Momcilovic*').[2] This case note will critically examine the Victorian Court of Appeal's decision in *Bare* and highlight its practical implications for litigators looking to use the *Charter* in court.

Bare has several significant consequences for litigators. First, while not binding on this question, *Bare* considers in detail whether a breach of s 38(1) of the *Charter* by a public authority constitutes a jurisdictional error. Second, the Court adopts a very cautious approach to the use of international law to construe the scope of *Charter* rights. Litigators will need to take care in their use of international legal materials in future cases. Third, the Court's finding of a breach of s 38(1) shows that the *Charter* can be a powerful instrument for ensuring that human rights are taken into account by public authorities. Finally, the case illustrates how the *Administrative Law Act 1978* (Vic) ('*Administrative Law Act*') bolsters both claims of unlawfulness and access to remedies under the *Charter*.

[1] (2015) 326 ALR 198.

[2] (2011) 245 CLR 1.

II Facts

The appellant, Nassir Bare, migrated from Ethiopia to Australia with his family in 2004.[3] Bare alleged that, on 16 February 2009, police assaulted and racially vilified him during a random traffic stop. According to Bare, he was handcuffed, knocked to the ground, sprayed in the face with capsicum spray and kicked in the ribs. His head was pushed repeatedly into the gutter, chipping his teeth and cutting his jaw. During the assault, one of the police officers told Bare: 'you black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars'.[4]

On 3 February 2010, Bare complained to the Office of Police Integrity ('OPI') about the assault. Bare claimed that the police officers' conduct breached his right under s 10(b) of the *Charter* not to be treated or punished in a cruel, inhuman or degrading way.

Bare requested an independent investigation of his complaint by the OPI, rather than an internal investigation by Victoria Police. The OPI was an independent body[5] tasked with investigating serious police misconduct, and ensuring that police have regard to the human rights set out in the *Charter*.[6] It was established in part to address the concern that police investigations into police wrongdoing are compromised by the tendency 'to close ranks and cover up misconduct.'[7]

Under s 40(4)(b)(i) of the *Police Integrity Act 2008* (Vic), the Director of the OPI had a discretion to investigate a complaint if he considered it to be 'in the public interest' to do so. The 'public interest' encompassed matters such as

[3] The facts and legal grounds set out in this Part are taken primarily from Williams J's judgment at first instance: *Bare v Small* [2013] VSC 129 (25 March 2013) [1]–[41] ('*Small*').

[4] Ibid [3].

[5] *Police Integrity Act 2008* (Vic) s 9, as repealed by *Independent Broad-Based Anti-Corruption Commission Amendment (Investigative Functions) Act 2012* (Vic) s 16.

[6] Ibid ss 6(2), 8(1), as repealed by *Independent Broad-Based Anti-Corruption Commission Amendment (Investigative Functions) Act 2012* (Vic) s 16. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2008, 848–9 (Bob Cameron, Minister for Police and Emergency Services).

[7] Tim Prenzler, *Police Corruption: Preventing Misconduct and Maintaining Integrity* (CRC Press, 2009) 153. See also Tim Prenzler, 'The Evolution of Police Oversight in Australia' (2011) 21 *Policing and Society* 284, 288–9; Bec Smith and Shane Reside, *'Boys, You Wanna Give Me Some Action?' — Interventions into Policing of Racialised Communities in Melbourne* (2010) 16–18 <http://www.policeaccountability.org.au/wp-content/uploads/2014/03/Boys-Wanna-Give-Me-Some-Action.pdf>.

whether the complaint raised systemic issues, and the resources available to the OPI.[8]

Bare contended that, under s 10(b) of the *Charter*, he had an implied right to an effective, independent investigation of his mistreatment. The Director would act incompatibly with this implied right, contrary to s 38(1) of the *Charter*, if he declined to investigate and instead referred the complaint to an internal investigation. Section 38(1) states that it is unlawful for a public authority to act in a way that is incompatible with a human right ('the substantive obligation') or, in making a decision, to fail to give proper consideration to a relevant human right ('the procedural obligation').

On 19 October 2010, the Director's delegate decided that Bare's complaint should not be investigated by the OPI. Bare sought judicial review of this decision in the Supreme Court of Victoria.[9] Bare claimed that the decision was unlawful both on common law grounds, and under s 38(1) of the *Charter*. Bare argued that the delegate had acted in a way that was incompatible with his implied right to an effective investigation under s 10(b). Bare also argued that the delegate had failed to give proper consideration to his express rights under ss 10(b) and 8(3) of the *Charter*. Section 8(3) provides that '[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination'. Bare's application was dismissed at first instance.[10]

III Key *Charter* Issues on Appeal

Bare's appeal presented four important questions concerning the *Charter*.[11] The first question was whether a breach of s 38(1) of the *Charter* constituted a jurisdictional error ('the jurisdictional error issue'). The second question was whether there was an implied procedural right to an effective investigation under s 10(b) of the *Charter* ('the implied right issue'). If s 10(b) contained such an implied right, Bare argued, the delegate's decision was incompatible with that right, in breach of the substantive obligation under s 38(1). The third question was whether the delegate failed to give proper consideration to Bare's express rights under ss 8(3) and 10(b) when deciding not to investigate his complaint, in breach of the procedural obligation under s 38(1) ('the proper consideration issue'). Bare thus sought to challenge the delegate's

[8] *Bare* (2015) 326 ALR 198, 259 [231] (Warren CJ).

[9] *Small* [2013] VSC 129 (25 March 2013).

[10] Ibid [193] (Williams J).

[11] See *Bare* (2015) 326 ALR 198, 220–1 [71]–[72] (Warren CJ).

decision under both the substantive and procedural limbs of s 38(1). The fourth question was whether Bare was entitled to a remedy if the delegate's decision was unlawful under s 38(1) ('the remedy issue').

IV The Jurisdictional Error Issue

A *Background*

There is a jurisdictional error of law when a decision-maker acts outside the limits of his or her power.[12] Without diminishing the complexities of the concept,[13] a finding of jurisdictional error has at least two important implications. First, a person may seek a broader range of remedies. Orders in the nature of prohibition and mandamus are only available for jurisdictional error.[14] Orders in the nature of certiorari are also usually limited to jurisdictional error, unless the error appears on the face of the decision-maker's record.[15] Second, judicial review by the High Court and the state Supreme Courts for jurisdictional error is constitutionally entrenched.[16]

In *Bare*,[17] the jurisdictional error issue arose in connection with this second implication. Section 109 of the *Police Integrity Act 2008* (Vic) contained a privative clause which purported to oust judicial review of the delegate's decision. If s 109 of the Act applied to the decision, Bare could only escape its reach by establishing that a breach of s 38(1) of the *Charter* constituted jurisdictional error, review for which is constitutionally entrenched.[18]

In separate judgments, Tate JA and Santamaria JA held that s 109 did not apply to the delegate's decision.[19] This meant that the delegate's decision could

[12] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163] (Hayne J). See also *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 571–5 [66]–[77] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

[13] See, eg, Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139.

[14] See Mark Aronson, 'Jurisdictional Error without the Tears' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 331.

[15] See ibid.

[16] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk* (2010) 239 CLR 531.

[17] (2015) 326 ALR 198.

[18] *Kirk* (2010) 239 CLR 531, 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[19] *Bare* (2015) 326 ALR 198, 290–302 [330]–[376] (Tate JA), 362–4 [590]–[598] (Santamaria JA).

be challenged on the basis of either jurisdictional or non-jurisdictional error of law. Consequently, their Honours did not need to decide the jurisdictional error issue.[20] Warren CJ dissented on the application of s 109, and so was required to decide this issue.[21]

B *Warren CJ's Reasoning*

Warren CJ was unconstrained by authority. In *Director of Housing v Sudi*, Bell P implied that *Charter* unlawfulness constituted jurisdictional error.[22] The Court of Appeal subsequently overturned Bell P's decision on other grounds, without expressing an opinion on the jurisdictional error issue.[23]

Applying the High Court's approach in *Project Blue Sky Inc v Australian Broadcasting Authority*,[24] Warren CJ held that the relevant test was whether the legislature intended that non-compliance with s 38(1) would lead to invalidity.[25] Her Honour concluded, on the basis of the text, context and purpose of s 38(1), that Parliament did not intend a breach to constitute jurisdictional error.[26]

With respect to text, Warren CJ noted that the word 'unlawful' does not necessarily mean 'invalid'.[27] More importantly, Warren CJ held that the s 38(1) obligations are 'limited and imprecise', and thus lack the 'rule-like quality' indicative of a jurisdictional limit on power.[28] The substantive obligation requires a public authority to balance competing rights and interests in accordance with s 7(2) of the *Charter*.[29] The procedural obligation

[20] Ibid 303 [378], 304 [381] (Tate JA), 364 [600] (Santamaria JA).

[21] Ibid 221–30 [74]–[115]. Because this case note is concerned primarily with the *Charter* questions addressed in *Bare*, I will not examine the divergent reasoning of Warren CJ, Tate JA and Santamaria JA on the construction of s 109 of the *Police Integrity Act 2008* (Vic).

[22] [2010] VCAT 328 (31 March 2010) [121].

[23] *Director of Housing v Sudi* (2011) 33 VR 559, 569 [49] (Warren CJ), 596 [214] (Weinberg JA) ('*Sudi*').

[24] (1998) 194 CLR 355, 389–93 [92]–[100] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

[25] *Bare* (2015) 326 ALR 198, 238 [145].

[26] Ibid 236 [139].

[27] Ibid 238 [146], citing *Project Blue Sky* (1998) 194 CLR 355, 393 [100]; see also at 388–9 [91] (McHugh, Gummow, Kirby and Hayne JJ).

[28] *Bare* (2015) 326 ALR 198, 238 [146] quoting *Project Blue Sky* (1998) 194 CLR 355, 391 [95] (McHugh, Gummow, Kirby and Hayne JJ).

[29] *Bare* (2015) 326 ALR 198, 238 [146] (Warren CJ). This argument presumes that the rights protected by s 38(1) of the *Charter* are subject to reasonable limitation in accordance with

is a 'common or garden' activity for which there is 'no formula'.[30] The character of these obligations tells against a breach of s 38(1) resulting in invalidity.[31]

With respect to context, Warren CJ held that 'unlawful' should be given a consistent meaning across ss 38(1) and 39(1) of the *Charter*.[32] The word 'unlawful' does not appear to be limited to jurisdictional error in s 39(1), and thus should not be interpreted to denote jurisdictional error in s 38(1).[33]

With respect to purpose, Warren CJ held that the *Charter* was directed to ensuring that 'human rights are observed in administrative practice and the development of policy', rather than providing an avenue for judicial review by the courts.[34] The threat of invalidity for breach of s 38(1) was not the only way to achieve this purpose.[35] There remain a range of remedies available to a plaintiff for s 38(1) unlawfulness, including declarations, injunctions and orders in the nature of certiorari for error on the face of the record. The interpretive clause in s 32(1) is another mechanism by which the *Charter* advances this purpose.[36] For these reasons, Warren CJ held that this interpretation would not remove 'the normative force of the *Charter*'.[37]

Finally, Warren CJ noted that, if every breach of s 38(1) led to invalidity, all decisions by public authorities would require '*Charter* clearance in some form'.[38] This would result in public inconvenience and delays in governmental decision-making.[39] The text of s 38(1) 'would have to be resolutely clear to infer such an outcome.'[40]

s 7(2). This construction of the *Charter* has been adopted in a range of first instance decisions: see, eg, *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, 431 [108] (Hollingworth J) ('*Sabet*'); *Antunovic v Dawson* (2010) 30 VR 355, 371 [70] (Bell J) ('*Antunovic*'); *XX v WW* [2014] VSC 564 (17 December 2014) [109]–[110] (McDonald J) ('*XX*').

30 *Bare* (2015) 326 ALR 198, 238 [146], quoting *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 184 [185] (Emerton J) ('*Castles*').

31 *Bare* (2015) 326 ALR 198, 238 [146] (Warren CJ).

32 See ibid 239–40 [150]–[151].

33 See ibid.

34 Ibid 239 [149], quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).

35 *Bare* (2015) 326 ALR 198, 240 [152] (Warren CJ).

36 Ibid.

37 Ibid.

38 Ibid 240 [151].

39 Ibid 239–40 [151], citing *Project Blue Sky* (1998) 194 CLR 355, 392 [97] (McHugh, Gummow, Kirby and Hayne JJ).

40 *Bare* (2015) 326 ALR 198, 240 [151] (Warren CJ).

For Warren CJ, this was sufficient to dispose of Bare's appeal.[41] The privative clause protected the delegate's decision.[42] Even if the delegate had breached s 38(1), the error was not jurisdictional, and thus not susceptible to judicial review.[43]

C *Tate JA and Santamaria JA's Reasoning*

Although Tate JA and Santamaria JA did not need to decide this issue,[44] both made substantial comments in obiter. Tate JA observed that there were 'powerful considerations on both sides of the argument'.[45] Her Honour noted only one argument in favour of,[46] and at least three arguments against,[47] Bare's submission that a breach of s 38(1) was a jurisdictional error. Santamaria JA was content to 'offer some observations' on the parties' contentions.[48] His Honour largely echoed Warren CJ's reasoning on this issue, raising no arguments in favour of, and at least four arguments against, Bare's submission.[49] The balance of Tate JA and Santamaria JA's comments thus weighed in favour of Warren CJ's conclusion.[50] Where relevant, these comments will be examined below.

D *Analysis*

There are several important points to draw out of the Court's consideration of this issue. First, Warren CJ's claim that the s 38(1) obligations are 'limited and imprecise'[51] is concerning for human rights litigators. It suggests that human

41 Ibid 230 [116].

42 Ibid 225–6 [94]–[98], 230 [114].

43 Ibid 256 [216].

44 Ibid 303 [378], 304 [381] (Tate JA), 364 [600] (Santamaria JA).

45 Ibid 304 [383].

46 Ibid 305 [386].

47 Ibid 303–4 [379]–[380], 306–7 [388]–[389], 307–9 [391]–[393].

48 Ibid 364 [600].

49 Ibid 370–4 [617]–[626].

50 Ibid 303–10 [378]–[397] (Tate JA), 370–4 [617]–[626] (Santamaria JA). In several places, Tate JA and Santamaria JA noted the very arguments accepted by Warren CJ: see, eg, at 306 [388] (Tate JA), 370 [617], 371–2 [620]–[621], 373–4 [624]–[626] (Santamaria JA).

51 Ibid 238 [146].

rights are indeterminate and uncertain, a critique often mobilised by those who oppose legal frameworks for the protection of human rights.[52]

Second, although Warren CJ held that the need for '*Charter* clearance' of public decision-making 'would place a substantial burden on the [s]tate',[53] it might be argued that this was the very object of the *Charter*. The *Charter*'s main purpose is to 'protect and promote human rights', by 'imposing an obligation on *all* public authorities' to act compatibly with human rights.[54] The second reading speech contemplates public authorities dealing with 'difficult issues of balancing competing rights and obligations in carrying out their functions'.[55] It states that s 38(1) was intended to '*ensure* that human rights are observed in administrative practice'.[56]

Third, Warren CJ's contextual argument based on s 39(1) requires closer examination. Santamaria JA's reasoning was very similar to that of Warren CJ. However, their Honours' analysis is brief and, with respect, not entirely clear.

Section 39(1) sets out the *Charter*'s remedial scheme. It states that:

> If, otherwise than because of this *Charter*, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this *Charter*.

This provision has been a source of consternation.[57] In *Director of Housing v Sudi* ('*Sudi*'), Weinberg JA described s 39(1) as 'convoluted and extraordinarily difficult to follow.'[58]

Notwithstanding the prolixity of s 39(1), the Supreme Court has progressively clarified its operation. As noted by Maxwell P in *Sudi*, s 39(1) 'has an operation which is both conditional and supplementary.'[59] A person must first satisfy the 'may seek' condition: that, independently of the *Charter*, he or she '*may seek* any relief or remedy in respect of an act or decision of a public

[52] See, eg, Gunnar Beck, 'The Mythology of Human Rights' (2008) 21 *Ratio Juris* 312.

[53] *Bare* (2015) 326 ALR 198, 239–40 [151].

[54] *Charter* s 1(2)(c) (emphasis added).

[55] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).

[56] Ibid (emphasis added).

[57] See, eg, Jeremy Gans, 'The *Charter*'s Irremediable Remedies Provision' (2009) 33 *Melbourne University Law Review* 105.

[58] (2011) 33 VR 559, 596 [214].

[59] Ibid 580 [96].

authority on the ground that the act or decision was unlawful'.[60] If this condition is satisfied, the person may seek that relief or remedy on a ground of *Charter* unlawfulness, such as a failure to give proper consideration to human rights.[61]

The contextual argument put by Warren CJ and Santamaria JA in *Bare*[62] rests on the following propositions:

1 s 39(1) of the *Charter* uses the words 'a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful';

2 under Victorian law, a person may seek relief in respect of a public authority's act or decision on the ground that the act or decision was unlawful by relying on a jurisdictional error, a non-jurisdictional error, or a combination of both;[63]

3 therefore, the word 'unlawful' in s 39(1) is 'used to include errors of law that do *not* result in invalidity';[64]

4 therefore, 'there is no basis for presuming that the same term, when used in s 38(1), relates solely to errors that are jurisdictional';[65] and

5 therefore, the word 'unlawful' in s 38(1) denotes non-jurisdictional error.

With respect, this reasoning is unconvincing. The jurisdictional error issue arises because the word 'unlawful' in s 38(1) is ambiguous. But as the third proposition accepts, the word 'unlawful' is equally ambiguous in s 39(1). It is used to include both jurisdictional and non-jurisdictional errors of law. Contrary to the fifth proposition, the word 'unlawful' in s 39(1) provides no basis for presuming that the same word in s 38(1) relates solely to errors that are *non-jurisdictional*.

Tate JA and Santamaria JA noted a different contextual argument for the same conclusion. Section 39(1) makes *Charter* unlawfulness 'supplemen-

60 Ibid, quoting *Charter* s 39(1) (emphasis added).

61 *Sudi* (2011) 33 VR 559, 580 [96] (Maxwell P), citing *Charter* s 39(1).

62 (2015) 326 ALR 198.

63 See ibid 239 [150] (Warren CJ), 371–2 [621] (Santamaria JA).

64 Ibid 371 [621] (Santamaria JA) (emphasis in original); see also at 234 [133], 239 [150] (Warren CJ).

65 Ibid 372 [621] (Santamaria JA); see also at 234 [133], 239 [150] (Warren CJ).

tary'.[66] It seems incoherent to claim that Parliament intended for a breach of s 38(1) to lead to invalidity, but also stipulated through s 39(1) that 'a breach of s 38(1) would not warrant relief unless some other ground of unlawfulness could be found.'[67]

This argument relies on a particular view of s 39(1). The precise operation of s 39(1) is yet to be resolved.[68] Courts have held that the 'may seek' condition is satisfied if a person in fact exercises a right to seek relief in respect of a public authority's act or decision, on a non-*Charter* ground of unlawfulness.[69] The non-*Charter* ground does not need to be successful,[70] but it may need to be sufficiently arguable to survive an application to strike out.[71] This is the 'factual availability' interpretation of s 39(1).[72]

The alternative, 'abstract availability' interpretation is broader. On this interpretation, a person may seek relief on a ground of *Charter* unlawfulness provided that the act or decision is, in principle, amenable to judicial review, and the person has standing and brings the claim in the correct forum.[73] There is no need for an arguable non-*Charter* ground of unlawfulness. The 'abstract availability' interpretation has not yet been applied by the courts.

The contextual argument put by Tate JA and Santamaria JA relies on the 'factual availability' interpretation of s 39(1). Indeed, Santamaria JA appeared to endorse this interpretation. His Honour stated that s 39(1) provides that 'if, apart from the *Charter*, a person has "grounds" for any relief or remedy, those grounds may be supplemented by "a ground of unlawfulness arising because

[66] Ibid (2015) 308 [392] (Tate JA), citing *Sudi* (2011) 33 VR 559, 580 [96] (Maxwell P); see also at 373 [625] (Santamaria JA).

[67] *Bare* (2015) 326 ALR 198, 309 [392]; see also at 309 [393] (Tate JA), 373 [625] (Santamaria JA).

[68] Ibid 310 [396] (Tate JA).

[69] See, eg, *Sabet* (2008) 20 VR 414, 430 [104]–[105] (Hollingworth J); *PJB v Melbourne Health* (2011) 39 VR 373, 438–9 [297] (Bell J) ('*Patrick's Case*'); *DPP (Vic) v Debono* [2013] VSC 407 (1 February 2013) [82] (Kyrou J) ('*Debono*'); *Goode v Common Equity Housing Ltd* [2014] VSC 585 (21 November 2014) [25]–[39] (Bell J).

[70] *Patrick's Case* (2011) 39 VR 373, 438–9 [297] (Bell J); *Debono* [2013] VSC 407 (1 February 2013) [82] (Kyrou J).

[71] Pamela Tate, 'A Practical Introduction to the *Charter of Human Rights and Responsibilities*' (Speech delivered at the Seminar Program of the Victorian Government Solicitor's Office, Melbourne, 29 March 2007).

[72] Mark Moshinsky, 'Bringing Legal Proceedings against Public Authorities for Breach of the *Charter of Human Rights and Responsibilities*' (2014) 2 *Judicial College of Victoria Online Journal* 91, 96, quoted in *Bare* (2015) 326 ALR 198, 309 [394] (Tate JA).

[73] See Moshinsky, above n 72, 96, quoted in *Bare* (2015) 326 ALR 198, 309–10 [394] (Tate JA).

of this *Charter*".'[74] Tate JA expressly declined to determine whether this interpretation was open, and noted that the proper construction of s 39(1) remained unresolved.[75] The force of this argument is contingent on this question.

Following *Bare*, there is still no binding Court of Appeal authority on the jurisdictional error issue.[76] While Warren CJ's judgment and Tate JA and Santamaria JA's obiter have persuasive force, the issue remains open for a future court.

In any case, the practical consequences for litigators may be limited. There remain powerful remedies available for non-jurisdictional error, and thus for *Charter* unlawfulness on Warren CJ's interpretation.[77] As discussed in Part VII below, the *Administrative Law Act* makes orders in the nature of certiorari readily available for non-jurisdictional error in Victoria.

Moreover, Parliament can already oust the *Charter* through an override declaration under s 31 of the *Charter*. Section 31 empowers Parliament to declare that a statutory provision is incompatible with the *Charter*,[78] with the consequence that the *Charter* has no application to that provision.[79] Warren CJ's interpretation of s 38(1) merely permits Parliament to achieve the same result through a privative clause.[80]

V The Implied Right Issue

A *Bare's Argument*

Bare claimed that the delegate's decision breached the substantive obligation under s 38(1) of the *Charter*.[81] The decision not to investigate was incompatible with his right under s 10(b) of the *Charter*, Bare argued, because s 10(b)

[74] *Bare* (2015) 326 ALR 198, 373 [625].

[75] Ibid 310 [396].

[76] See ibid 304 [381] (Tate JA), 364 [600] (Santamaria JA).

[77] Ibid 240 [152].

[78] *Charter* s 31(1).

[79] Ibid s 31(6).

[80] Tate JA suggested that this result might weigh in favour of the view that a breach of s 38(1) is a non-jurisdictional error of law. Tate JA noted that it would seem anomalous if Parliament could, through s 31 of the *Charter*, 'preclude review of decisions taken by public authorities for compliance with the *Charter*, despite their resulting in jurisdictional error, which it had no power to do, for constitutional reasons, through the use of an ouster clause': *Bare* (2015) 326 ALR 198, 303 [379].

[81] Ibid 221 [71].

contained an implied right to an effective investigation of a credible complaint of cruel, inhuman or degrading treatment ('implied right').[82]

Bare's argument drew on an established body of international jurisprudence. Section 10(b) is virtually identical to corresponding provisions in the European *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*'),[83] the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[84] and the *Human Rights Act 1998* (UK) c 42 ('*UKHRA*').[85] Each of these instruments has been found to contain an implied right to an effective investigation.[86] Courts have held that the implied right is necessary for the practical efficacy of the substantive right not to be subjected to torture or cruel, inhuman or degrading treatment.[87] Without the implied right, the substantive right would be merely 'theoretical or illusory'.[88]

For example, *Assenov* concerned a teenager who was allegedly arrested and beaten by police.[89] The internal investigation concluded that the teenager's injuries had been inflicted either by his father or because he had not been compliant with police.[90] There was no evidence to support these conclusions, and the authorities failed to contact the people who actually witnessed the incident.[91] This failure to conduct an effective investigation constituted a violation of the teenager's rights under the *ECHR*.[92]

Bare argued that this reasoning applied with equal force to the right contained in s 10(b) of the *Charter*.[93] Moreover, in his circumstances, an effective investigation could only be conducted by an entity independent of Victoria

[82] Ibid 220–1 [71].

[83] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 3.

[84] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7.

[85] *Human Rights Act 1998* (UK) c 42, sch 1 pt I art 3.

[86] See, eg, Human Rights Committee, *Views: Communication No 1945/2010*, 107th sess, UN Doc CCPR/C/107/D/1945/2010 (27 March 2013) 13–14 [8.6] ('*Puertas v Spain*'); *Assenov v Bulgaria* [1998] VIII Eur Court HR 3264, 3290 [102] ('*Assenov*'); *D v Commissioner of Police of the Metropolis* [2016] QB 161, 179–82 [10]–[20] (Laws LJ) ('*D v Commissioner of Police*').

[87] See, eg, *Assenov* [1998] VIII Eur Court HR 3264, 3290 [102].

[88] *Banks v United Kingdom* (2007) 45 EHRR SE2 15, 21.

[89] [1998] VIII Eur Court HR 3264, 3271 [8]–[9].

[90] Ibid 3290–1 [103]–[104].

[91] Ibid.

[92] Ibid 3290–1 [104]–[106].

[93] See *Bare* (2015) 326 ALR 198, 374 [627]–[629].

Police, such as the OPI.[94] Bare also argued that the delegate's decision to refer Bare's complaint to an internal investigation was incompatible with the implied right.[95]

B *The Court's Reasoning*

The Court held unanimously that s 10(b) of the *Charter* did not contain an implied right to an effective investigation, with all three judges giving very similar reasons.

This conclusion was grounded in an unease about the use of international materials to construe the *Charter*. In *Momcilovic*, French CJ and Gummow J suggested that courts should be careful in their use of international legal materials, given the different legal and constitutional settings from which they emerge.[96] The Court of Appeal held that Bare's argument ignored these warnings.[97] The *ECHR*, the *ICCPR* and the *UKHRA* differed materially from the *Charter* in their terms and legal setting. These differences were essential to the international jurisprudence on the implied right. Therefore, the international decisions provided no support for the implication of a similar right from s 10(b) of the *Charter*.[98]

The Court's approach to the European case law illustrates this pattern of reasoning. Article 3 of the *ECHR* states that no person 'shall be subjected to torture or to inhuman or degrading treatment or punishment.' Article 1 requires member states to secure the rights and freedoms under the *ECHR* to everyone within their jurisdiction. Article 13 states that a person whose rights are violated has a right to 'an effective remedy'.

First, the Court held that the *Charter* contained no provisions equivalent to arts 1 or 13 of the *ECHR*.[99] With respect to art 13 of the *ECHR*, the *Charter* fails to provide specific, stand-alone remedies for breaches of human rights.[100]

94 Ibid 374 [627].

95 Ibid 221 [71].

96 (2011) 245 CLR 1, 37–8 [19]–[20], 49–50 [49]–[50] (French CJ), 83–7 [146], 89 [155], 90 [159] (Gummow J).

97 (2015) 326 ALR 198, 247–8 [182]–[185] (Warren CJ), 325 [447] (Tate JA), 375 [631] (Santamaria JA).

98 Ibid 246 [178], 248 [185]–[186] (Warren CJ), 325 [447], 327 [457] (Tate JA), 390 [665] (Santamaria JA).

99 Ibid 247–8 [184], 251 [197] (Warren CJ), 313 [411], 314 [415] (Tate JA) 382 [645] (Santamaria JA).

100 Ibid 247–8 [184] (Warren CJ), 314 [415] (Tate JA).

With respect to art 1 of the *ECHR*, public authorities are not in an analogous position to member states, which are required to ensure that rights and freedoms are protected in their jurisdictions.[101]

Second, the Court observed[102] that the European Court of Human Rights ('ECtHR') first recognised the implied right in *Assenov*.[103] In *Assenov*, the ECtHR derived the implied right from art 3, 'read in conjunction with the [s]tate's general duty under Article 1 of the *Convention*'.[104] The ECtHR also held that the right to an effective remedy under art 13 of the *ECHR* required 'effective access for the complainant to the investigatory procedure'.[105] The Court of Appeal concluded that the ECtHR had relied on the additional obligations of member states under arts 1 and 13 to derive the implied right.[106]

Third, the Court held that although several more recent ECtHR decisions suggested the implied right derived solely from art 3 of the *ECHR*, these decisions were themselves based on the authority of *Assenov*.[107]

The Court used the same reasoning to distinguish the *ICCPR* jurisprudence. Article 2(3) of the *ICCPR* confers a right to an effective remedy. The Human Rights Committee has relied on this provision, in conjunction with the right not be subjected to torture or cruel, inhuman or degrading treatment under art 7 of the *ICCPR*, to imply the right to an effective investigation.[108]

Finally, the Court considered the *UKHRA* case law on the implied right. The *UKHRA* protects the rights set out in the *ECHR*, which is attached as a schedule.[109] While sch 1 includes *ECHR* art 3, it does not include arts 1 or 13.[110] In the recent decision in *D v Commissioner of Police of the Metropolis*

101 Ibid 251 [197] (Warren CJ), 317 [423]–[424] (Tate JA).

102 Ibid 248–9 [187] (Warren CJ), 312 [405] (Tate JA), 380–1 [642] (Santamaria JA).

103 [1998] VIII Eur Court HR 3264.

104 Ibid 3290 [102]; *ECHR* arts 1, 3.

105 Ibid 3293 [117].

106 *Bare* (2015) 326 ALR 198, 249 [189] (Warren CJ), 318–19 [427] (Tate JA), 382 [645] (Santamaria JA).

107 Ibid 249–50 [189]–[192] (Warren CJ), 318–19 [425]–[427] (Tate JA), 379–82 [640]–[645] (Santamaria JA).

108 *Puertas v Spain*, UN Doc CCPR/C/107/D/1945/2010, 13–14 [8.6], 14 [10], quoted in *Bare* (2015) 326 ALR 198, 255 [211]–[212] (Warren CJ), 325–6 [450], 326–7 [453], 327 [455] (Tate JA), 382–3 [646]–[648] (Santamaria JA).

109 *UKHRA* s 1(2) provides that the specified *ECHR* arts contained in sch 1 'have effect for the purposes of this Act subject to any designated derogation or reservation'.

110 *UKHRA* s 1(a).

('*D v Commissioner of Police*'), the England and Wales Court of Appeal expressly rejected the claim that the implied right depended on art 1 of the *ECHR*.[111]

However, the Court distinguished the English case law on a number of grounds. First, s 8(1) of the *UKHRA* authorises a court to grant a 'just and appropriate' remedy for an unlawful act by a public authority. This provision explained the absence of art 13 of the *ECHR*, because it embodied the right to a remedy for a breach of human rights.[112] Further, this provision for a stand-alone remedy distinguished the *UKHRA* from the *Charter*.[113]

Second, the absence of art 1 of the *ECHR* was explicable on the grounds that the *UKHRA* was itself enacted to satisfy the United Kingdom's obligations under art 1.[114] Therefore, it would be misguided to use the absence of art 1 to establish that the implied right under the *UKHRA* derived from art 3 alone.[115]

Third, under s 2(1)(a) of the *UKHRA*, courts must take into account relevant decisions of the ECtHR.[116] Australian courts are not similarly bound to follow the Strasbourg jurisprudence.[117] The English courts had recognised the implied right in part out of a concern to avoid a 'substantial mismatch' between the scope of art 3 under the *ECHR* and under the *UKHRA*.[118] To the extent that the English case law depended on the European jurisprudence, it was tainted by the same reliance on arts 1 and 13 of the *ECHR*.[119] For these reasons, the Court held that the *UKHRA* case law was of limited use in construing s 10(b) of the *Charter*.[120]

Having distinguished the international materials, the Court held that there were no grounds for the implication of a right to an effective investigation from s 10(b). Warren CJ noted that the *Charter* provides expressly for

111 [2016] QB 161, 181 [15] (Laws LJ).

112 *Bare* (2015) 326 ALR 198, 247–8 [184] (Warren CJ).

113 Ibid 247–8 [184]–[185] (Warren CJ), 322 [437] (Tate JA).

114 Ibid 252 [201], 254 [207] (Warren CJ), citing *D v Commissioner of Police* [2016] QB 161, 181–2 [17]; see also ibid at 321 [434]–[435] (Tate JA), 385–6 [653]–[654], 389 [663] (Santamaria JA).

115 *Bare* (2015) 326 ALR 198, 252 [201] (Warren CJ).

116 Ibid 253 [204] (Warren CJ), 321–2 [436], 324 [442]–[443] (Tate JA), 386 [655], 390 [665] (Santamaria JA).

117 Ibid 247–8 [184] (Warren CJ), 324 [443], 325 [447] (Tate JA), 386 [656] (Santamaria JA).

118 *D v Commissioner of Police* [2016] QB 161, 181 [16] (Laws LJ), quoted in ibid 324 [445] (Tate JA), 389 [662] (Santamaria JA).

119 *Bare* (2015) 326 ALR 198, 252–3 [202]–[205], 255 [213] (Warren CJ), 321–2 [436], 324 [444] (Tate JA), 388–9 [661], 390 [665] (Santamaria JA).

120 Ibid 255–6 [213]–[214] (Warren CJ), 325 [447] (Tate JA), 390 [665] (Santamaria JA).

procedural rights in certain circumstances.[121] Her Honour inferred from this that the legislature 'did not intend to provide procedural protections for all rights.'[122] Warren CJ and Santamaria JA held that recognising the implied right would amount to reading words into the *Charter*.[123] Courts may only read in words in limited circumstances, which were not satisfied in this case.[124] To similar effect, Tate JA concluded that the question of a right to an effective investigation is 'a matter for the legislature to decide.'[125]

C *Analysis*

Bare sends a warning to litigators who seek to use international materials to shed light on the scope of *Charter* rights. The Court's reasoning raises several points which will have significant consequences for future *Charter* litigation.

The first point is that the Court endorsed an expansive reading of the cautionary comments in *Momcilovic*.[126] In *Momcilovic*, French CJ and Gummow J were concerned about the use of international materials to construe the *Charter*'s operative provisions — ss 7(2), 32(1) and 36 — given Australia's distinctive constitutional setting.[127] With respect, this is clearly correct. Australia's constitutional principles, such as the *Kable* doctrine,[128] are relevant to the construction of s 32(1) of the *Charter* in a way that distinguishes it from its *UKHRA* counterpart.[129] But this argument has little relevance to the content of *Charter* rights. Whether s 10(b) contains an implied right to an effective investigation does not raise questions about the role of courts in Australia's constitutional setting.

Warren CJ recognised this distinction, but held that the comments in *Momcilovic*[130] applied 'equally to the interpretation of the scope of rights

[121] Ibid 246 [180], citing *Charter* ss 21(4)–(5).

[122] *Bare* (2015) 326 ALR 198, 247 [181].

[123] Ibid 247 [181] (Warren CJ), 390 [667]–[668] (Santamaria JA).

[124] Ibid 243 [164] n 112, 247 [181] (Warren CJ), 390 [667]–[668] (Santamaria JA). For a discussion of these circumstances see *Jones v Wrotham Park Settled Estates* [1980] AC 74, 105–6 (Lord Diplock); *DPP (Vic) v Leys* (2012) 44 VR 1, 15–39 [45]–[111].

[125] *Bare* (2015) 326 ALR 198, 327 [457].

[126] (2011) 245 CLR 1.

[127] Ibid 37–8 [19]–[20], 48–9 [47], 49–50 [49]–[50] (French CJ), 83–7 [146], 89–90 [155]–[159] (Gummow J).

[128] *Kable v DPP (NSW)* (1996) 189 CLR 51.

[129] Ibid 83–7 [146] (Gummow J).

[130] (2011) 245 CLR 1

within the *Charter*.'[131] The Court in *Bare* thus went beyond *Momcilovic*, adopting a general caution towards the use of international materials in construing the *Charter*. Consequently, litigators must be careful in drawing on international materials which in turn refer to provisions that are not present in the *Charter*. *Bare* suggests their interpretive value will be limited.

This approach contrasts with the positive reception of international materials in several earlier *Charter* cases. In *Castles v Secretary, Department of Justice* ('*Castles*'), for instance, Emerton J stated that recourse to international materials was 'a good thing, as it will expose Victorian jurisprudence to relevant jurisprudence from other parts of the world'.[132]

The second point is that, in interpreting the scope of s 10(b), the Court departed from or ignored several accepted principles of statutory construction. A domestic statute which implements a treaty provision should be construed according to the meaning of the treaty provision in international law,[133] rather than by technical rules of domestic law.[134] As Dawson J noted in *Applicant A v Minister for Immigration and Ethnic Affairs* ('*Applicant A*'), '[b]y transposing the provision of the treaty, the legislature discloses the prima facie intention that it have the same meaning in the statute as it does in the treaty.'[135] Only Tate JA recognised this principle in *Bare*,[136] and it played little role in her Honour's analysis.

The *Charter* is clearly intended to implement into Victorian law the rights set out in the *ICCPR*.[137] Section 10(b) of the *Charter* is virtually identical to art 7 of the *ICCPR*. The Explanatory Memorandum confirms that s 10(b) 'is

131 *Bare* (2015) 326 ALR 198, 247 [182].

132 (2010) 28 VR 141, 161 [70], quoted in *Patrick's Case* (2011) 39 VR 373, 392 [71] (Bell J).

133 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265 (Brennan J) ('*Koowarta*'); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–1 (Brennan CJ), 239–40 (Dawson J), 292 (Kirby J) ('*Applicant A*'); *Maloney v The Queen* (2013) 252 CLR 168, 180–1 [14] (French CJ), 255–6 [235]–[236] (Bell J), 292–3 [326]–[328] (Gageler J) ('*Maloney*'); *Iliafi v Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86, 104 [56] (Kenny J) ('*Iliafi*'); *BZAFM v Minister for Immigration and Border Protection* (2015) 321 ALR 117, 129 [45] ('*BZAFM*').

134 See *The Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142, 159 (Mason and Wilson JJ) ('*Gamlen*'), citing *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce). See also *Morrison v Peacock* (2002) 210 CLR 274, 279 [16] ('*Morrison*').

135 (1997) 190 CLR 225, 239.

136 (2015) 326 ALR 198, 311 [399].

137 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1, 8; *Momcilovic* (2011) 245 CLR 1, 202 [520] (Crennan and Kiefel JJ), 244–5 [672] (Bell J); *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [199] (Tate JA).

modelled on article 7'.[138] This supports the conclusion that the legislature intended for s 10(b) to be interpreted in accordance with the same principles, and to have the same content, as art 7.

Having distinguished the international materials, Warren CJ and Santamaria JA rejected the implied right on the grounds that the common law rules for reading words into a statute were not satisfied.[139] However, these rigid rules are ill-suited to the interpretation of the *Charter*, which gives domestic effect to international human rights law.[140] The very nature of human rights means that their scope cannot be determined by reference to the text alone. As Emerton J noted in *Castles*, the *Charter* rights 'are, essentially, statements of principle and have to be given content.'[141] Bare's arguments did not amount to reading words into s 10(b), but merely defining its scope and content.

Rather than applying these technical rules, courts should construe the *Charter* according to the principles for the interpretation of international human rights instruments.[142] One such principle is that a human rights instrument should be interpreted so as to make its protections practical and effective ('the principle of effectiveness').[143] This reflects the purpose of such instruments: to protect individual human beings.[144] In *Patrick's Case*, Bell J

[138] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 10.

[139] See *Bare* (2015) 326 ALR 198, 246 [179], 247 [181] (Warren CJ), 390 [667]–[668] (Santamaria JA).

[140] *Morrison* (2002) 210 CLR 274, 279 [16]; *Gamlen* (1980) 147 CLR 142, 159 (Mason and Wilson JJ); see also the concurring judgments at 149 (Gibbs J), 168 (Aickin J).

[141] (2010) 28 VR 141, 160 [68].

[142] *Koowarta* (1982) 153 CLR 168, 265 (Brennan J); *Applicant A* (1997) 190 CLR 225, 230–1 (Brennan CJ), 239–40 (Dawson J), 292 (Kirby J); *Maloney* (2013) 252 CLR 168, 180–1 [14] (French CJ), 255–6 [235]–[236] (Bell J), 292–3 [326]–[328] (Gageler J); *Iliafi* (2014) 221 FCR 86, 104 [56] (Kenny J); *BZAFM* (2015) 321 ALR 117, 129 [45].

[143] With respect to the *ECHR* see, eg, *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A) 34 [87]; *Loizidou v Turkey* (1995) 310 Eur Court HR (ser A) 27 [72] ('*Loizidou*'); *Airey v Ireland* (1979) 32 Eur Court HR (ser A) 12–14 [24]. With respect to the *ICCPR* see, eg, Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 3 [6]; Human Rights Committee, *Views: Communication No 1061/2002*, 84th sess, UN Doc CCPR/C/84/D/1061/2002 (4 August 2005) 9 [8.4] ('*Fijalkowska v Poland*'); Human Rights Committee, *Views: Communication No 195/1985*, 39th sess, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) [5.5] ('*Páez v Colombia*').

[144] *Loizidou* (1995) 310 Eur Court HR (ser A) 27 [72].

applied this principle when construing the scope of the right to property under s 20 of the *Charter*.[145]

Applied to ss 10(b) and 38(1) of the *Charter*, the principle of effectiveness supports the implication of a right to an effective investigation. Sections 10(b) and 38(1) prohibit public authorities from acting incompatibly with a person's right not to be treated in a cruel, inhuman or degrading way. The prohibition would be rendered ineffective without an independent procedure to review credible allegations of serious mistreatment by public authorities.[146]

With respect, it is difficult to sustain Warren CJ's comment that the *Charter* 'does not speak in the broad terms of protection that are outlined in Art 1 of the *ECHR*.'[147] In *D v Commissioner of Police*, Laws LJ held that the obligation on public authorities to act compatibly with human rights under s 6(1) of the *UKHRA* is analogous to art 1 of the *ECHR*.[148] A similar argument can be made with respect to the *Charter*. Section 38(1) of the *Charter* mirrors s 6(1) of the *UKHRA*. It is a key mechanism by which the *Charter* pursues its purpose of promoting and protecting human rights.[149] Moreover, s 3(1) of the *Charter* defines 'act' to include 'a failure to act'. The *Charter* thus contemplates that the obligations of public authorities extend to taking positive action to secure human rights. Finally, s 6(1) of the *Charter* states that '[a]ll persons have the human rights set out in Part 2'. The preamble recognises that the enjoyment of those human rights is '*essential* in a democratic and inclusive society'.[150]

This interpretive approach arguably prevailed in the *Charter* case law prior to *Bare*. Judges have stressed repeatedly that *Charter* rights should be construed 'in the broadest possible way.'[151] Only then does s 7(2) operate to

145 (2011) 39 VR 373, 396 [89].

146 See *Assenov* [1998] VIII Eur Court HR 3264, 3290 [102].

147 *Bare* (2015) 326 ALR 198, 248 [184]; see also at 313 [411] (Tate JA), 382 [645] (Santamaria JA).

148 [2016] QB 161, 181–2 [17].

149 *Charter* s 1(2)(c); Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).

150 *Charter* Preamble (emphasis added). Recourse to a preamble is permissible to shed light on statutory purpose and object: *Wacando v Commonwealth* (1981) 148 CLR 1, 23 (Mason J).

151 *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 434 [80] (Warren CJ) ('*Re Application*'), quoted in *Castles* (2010) 28 VR 141, 158 [55] (Emerton J). This principle was also endorsed in *Antunovic* (2010) 30 VR 355, 371 [71] (Bell J); *Patrick's Case* (2011) 39 VR 373, 384 [36] (Bell J); *DPP (Vic) v Kaba* (2014) 44 VR 526, 557 [108] (Bell J) ('*Kaba*').

permit limitations on rights in pursuit of other societal goals.[152] This principle reflects the legislative intent of the *Charter* 'that individuals should receive the full benefit of its protection.'[153] When applied to s 10(b), it supports the implication of a right to an effective investigation.

This construction is supported by another principle of statutory interpretation: that so far as their text allows, state and federal statutes should be interpreted to conform to Australia's international obligations ('the principle of consistency').[154] There is uncertainty over the extent to which the statutory text must be ambiguous before the principle of consistency applies.[155] But, in any case, the obligation imposed by ss 10(b) and 38(1) — a public authority must act compatibly with a person's right not to be 'treated or punished in a cruel, inhuman or degrading way' — is relevantly ambiguous, in that its meaning is doubtful.[156]

Australia has agreed to be bound by the *ICCPR*, including the art 7 obligation to provide an effective investigation of credible allegations of cruel, inhuman or degrading treatment. The recognition of an implied right to an effective investigation in s 10(b) of the *Charter* would better conform with Australia's international obligations. However, no member of the Court in *Bare* referred to this principle when construing s 10(b).

[152] *Re Application* (2009) 24 VR 415, 434 [80] (Warren CJ).

[153] *Antunovic* (2010) 30 VR 355, 371 [71] (Bell J).

[154] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J), 304 (Gaudron J) ('*Teoh*'); *AMS v AIF* (1999) 199 CLR 160, 180 [50] (Gleeson CJ, McHugh and Gummow JJ); *Momcilovic* (2011) 245 CLR 1, 36–7 [18] (French CJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 526–7 [8] (French CJ); *Firebird Global Master Fund II Ltd v Nauru* (2015) 326 ALR 396, 407 [44] (French CJ and Kiefel J), 423 [134] (Gageler J); *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 39 [75] (Maxwell P).

[155] See, eg, *Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 386 [101] (Gummow and Hayne JJ); *Coleman v Power* (2004) 220 CLR 1, 27–8 [19] (Gleeson CJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 234 [246]–[247] (Kiefel J); *Tajjour v New South Wales* (2014) 254 CLR 508, 554 [48] (French CJ); *Cheedy v Western Australia* (2011) 194 FCR 562, 583 [107]; *SZGIZ v Minister for Immigration and Citizenship* (2013) 212 FCR 235, 248–9 [59]; *Kaba* (2014) 44 VR 526, 567–8 [143]–[145] (Bell J). See generally Dan Meagher, 'The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)' [2012] *New Zealand Law Review* 465.

[156] See *Bowtell v Goldsbrough* (1905) 3 CLR 444, 456 (Barton J), 457–60 (O'Connor J); *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548, 577–8 [116] (Spigelman CJ); *R v Sharma* (2002) 54 NSWLR 300, 312–13 [55]–[57] (Spigelman CJ).

Thus, on ordinary principles of statutory construction, *Charter* rights should be construed as broadly as possible, in accordance with their meaning in international law and Australia's international obligations. These principles favour an implied right to an effective investigation. More importantly, it is difficult to reconcile these principles with the Court's narrow interpretive approach in *Bare*. Litigators must take care in their use of international materials in the future. Judges may now follow the narrow approach in *Bare* when interpreting the scope of *Charter* rights.

VI The Proper Consideration Issue

A *The Court's Reasoning*

Bare[157] presented the first opportunity for the Court of Appeal to confirm what is required under s 38(1) of the *Charter* for a public authority to give 'proper consideration' to human rights when making a decision.

Despite their finding on the implied right issue, Tate JA and Santamaria JA were still required to decide whether the delegate gave proper consideration to Bare's express rights under ss 8(3) and 10(b) of the *Charter*. Warren CJ did not need to resolve this issue, because of her Honour's conclusion that the privative clause ousted review of the delegate's decision, but nonetheless made detailed comments in obiter.[158]

The Court unanimously endorsed Emerton J's approach to proper consideration in *Castles*.[159] As restated in *Bare*, the *Castles* approach has four elements. First, the decision-maker must understand in general terms which of the rights of the person affected by the decision may be relevant.[160] Second, the decision-maker must seriously turn his or her mind to the possible impact of the decision on a person's human rights and its implications for the

[157] (2015) 326 ALR 198.

[158] Ibid 256–9 [216]–[231].

[159] (2010) 28 VR 141, 184 [185]–[186]. The Court of Appeal endorsed this approach at ibid 257 [221] (Warren CJ), 273–5 [277]–[279] (Tate JA), 343–4 [534]–[535] (Santamaria JA). The *Castles* approach had previously been endorsed in several other first instance decisions: *Patrick's Case* (2011) 39 VR 373, 442 [311] (Bell J); *Giotopoulos v Director of Housing* [2011] VSC 20 (7 February 2011) [90] (Emerton J); *XX* [2014] VSC 564 (17 December 2014) [115]–[119] (McDonald J).

[160] *Bare* (2015) 326 ALR 198, 257 [223] (Warren CJ), 278–9 [293]–[295] (Tate JA), 344–5 [538] (Santamaria JA).

person.[161] Third, the decision-maker must identify the countervailing interests or obligations.[162] Finally, the decision-maker must balance competing private and public interests as part of the exercise of justification.[163]

All three judges held that the delegate failed to satisfy these requirements when he decided not to investigate Bare's complaint.[164] In his letter to Bare's solicitor, the delegate stated that he had considered the OPI file and correspondence, the seriousness of the allegations and Bare's reference to s 10 of the *Charter*.[165] These statements did not, however, constitute proper consideration of Bare's human rights.[166] The delegate's reasons 'amounted to nothing more than a recitation of the *Charter* as a mantra'.[167]

The delegate did not demonstrate that he understood Bare's relevant rights.[168] It was necessary for him to consider whether the police officers' behaviour, if true, would constitute cruel, inhuman or degrading treatment, or a denial of equal protection of the law.[169] But he did not even mention Bare's equal protection right.[170] The OPI file had noted the 'racial nature of the attack', but the mere mention by the delegate that he had reviewed the file did not constitute proper consideration of this right.[171] The delegate also failed to seriously turn his mind to the possible impact of his decision on Bare's rights.[172] Finally, the delegate did not identify countervailing interests or obligations, or weigh them against Bare's interest in an OPI investigation.[173]

[161] Ibid 257 [221]–[222] (Warren CJ), 277 [288]–[289], 279 [296] (Tate JA), 344–5 [538], 345 [541] (Santamaria JA).

[162] Ibid 257 [221], 257–8 [224] (Warren CJ), 277 [288]–[289], 279 [296], 280 [298] (Tate JA), 344 [536], 344–5 [538] (Santamaria JA).

[163] Ibid 257 [221], (Warren CJ), 277 [288]–[289], 279 [296], 280 [298] (Tate JA), 352 [559] (Santamaria JA).

[164] Ibid 257–8 [221]–[224] (Warren CJ), 281 [301] (Tate JA), 345 [539] (Santamaria JA).

[165] Ibid 271–2 [273].

[166] Ibid 257 [222] (Warren CJ), 278–9 [293] (Tate JA).

[167] Ibid 279 [293] (Tate JA); see also at 257 [222] (Warren CJ).

[168] Ibid 257 [222]–[223] (Warren CJ), 278–9 [293]–[295] (Tate JA), 345 [539] (Santamaria JA).

[169] Ibid 278–9 [293], 279 [295], 280 [298] (Tate JA).

[170] Ibid 257 [223] (Warren CJ), 279 [295] (Tate JA), 345 [539] (Santamaria JA).

[171] See ibid 257 [223] (Warren CJ), 279 [295] (Tate JA).

[172] Ibid 257 [221]–[222] (Warren CJ), 279–80 [296]–[298] (Tate JA), 345 [539] (Santamaria JA).

[173] Ibid 257 [221] (Warren CJ), 279 [296] (Tate JA), 345 [539], [541] (Santamaria JA).

These countervailing interests might have included resource constraints or departmental priorities.[174]

B *Analysis*

A number of important points emerge from the Court's approach to the proper consideration issue. The Court's finding of a breach of the procedural obligation under s 38(1) is itself significant. This is only the third time that a court has upheld a claim that a public authority failed to give proper consideration to human rights when making a decision.[175]

Bare confirms that the *Charter* can be a powerful tool for ensuring that human rights are taken into account by government decision-makers. The three judgments examine in detail what s 38(1) requires of a public authority when making a decision that may affect human rights. Importantly, Warren CJ and Tate JA held that a public authority cannot skirt its s 38(1) obligations on the basis of a purported lack of expertise. In his letter to Bare's solicitor, the delegate stated expressly that he was not qualified to assess Bare's argument regarding the implied right under s 10(b).[176] Warren CJ and Tate JA held that this response was inadequate. Even though the implied right did not exist, the delegate should have considered Bare's argument on this point.[177] Tate JA held that the delegate should have sought legal advice if necessary.[178] He could not evade his obligations under s 38(1) on the basis that he was not qualified to assess Bare's interpretation of the *Charter*.[179]

Several elements of the procedural obligation remain unclear, however. The first is the true significance of the word 'proper'. According to Tate JA, the procedural obligation is more stringent than the common law obligation to take into account relevant considerations.[180] Where relevant matters are only implied by the statute, the common law requires merely that a decision-maker

[174] Ibid 344–5 [538] (Santamaria JA).

[175] The two other instances are *DPP (Vic) v KW* [2011] VCC (2 May 2011) [150]–[151] (Judge Mullaly); *Burgess v Director of Housing* [2014] VSC 648 (17 December 2014) [216]–[218] (Macaulay J) ('*Burgess*').

[176] *Bare* (2015) 326 ALR 198, 205 [20].

[177] Ibid 257–8 [224] (Warren CJ), 279–80 [297]–[298] (Tate JA).

[178] Ibid 280 [298].

[179] Ibid 279–80 [297].

[180] Ibid 273 [275]–[276]. Santamaria JA found it unnecessary to decide this question: at 343 [533] n 480.

'call his own attention to the matters which he is bound to consider'.[181] If the statute refers expressly to those matters, the decision-maker must make them 'a fundamental and focal element in the decision-making process.'[182] Tate JA held that the procedural obligation is stricter than either of these standards.[183] It requires the decision-maker to actively weigh the person's relevant rights against broader public interests and obligations.[184] Tate JA adopted this construction to give full meaning and effect to the word 'proper' in s 38(1) of the *Charter*.[185] It appears to pick up the colloquial meaning of 'proper' as 'complete or thorough'.[186]

On Tate JA's interpretation, the *Charter* has introduced a new, more intensive standard of judicial review. This is consistent with Emerton J's comments in *Castles* that, under the *Charter*, judges may assess 'the balance which the decision-maker has struck' and 'the relative weight accorded to interests and considerations'.[187] Under the common law, this is generally the decision-maker's domain.[188] But it is unclear how this more intensive standard applies to different decision-makers. The case law has been limited to public officials with the capacity, time and resources to undertake the evaluative process required by *Castles*.[189] The content of the procedural obligation in an emergency, where a public authority is making decisions quickly, has not been considered.[190] The word 'proper' can also mean 'adapted or appropriate to the purpose or circumstances'.[191] On this basis, and by analogy to the common

[181] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39 ('*Peko-Wallsend*'), quoted in ibid 273 [275] (Tate JA). The quote initially derives from Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229.

[182] *Insurance Australia Ltd v Motor Accidents Authority (NSW)* [2007] NSWCA 314 (8 November 2007) [40] (Spigelman CJ), cited in *Bare* (2015) 326 ALR 198, 273 [275] (Tate JA).

[183] *Bare* (2015) 326 ALR 198, 273 [275]–[276].

[184] Ibid 277 [287]–[289], 279 [296], 280 [298]–[299] (Tate JA).

[185] Ibid 273 [276], 277 [287], 280 [299].

[186] Susan Butler (ed), *Macquarie Dictionary* (6th ed, 2013) 949.

[187] (2010) 28 VR 141, 176 [145].

[188] *Peko-Wallsend* (1986) 162 CLR 24, 41–2 (Mason J). See also Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian *Charter of Human Rights and Responsibilities*' (2006) 17 *Public Law Review* 264, 278.

[189] (2010) 28 VR 141, 183–5 [178]–[187] (Emerton J). See also *Burgess* [2014] VSC 648 (17 December 2014) [45], [215]–[218] (Macaulay J); *Bare* (2015) 326 ALR 198, 271–2 [273].

[190] Courts have emphasised the flexibility of the procedural obligation: see, eg, *Castles* (2010) 28 VR 141, 184 [185] (Emerton J); *Patrick's Case* (2011) 39 VR 373, 442 [311] (Bell J)

[191] *Macquarie Dictionary*, above n 186, 948.

law rules of procedural fairness, the procedural obligation might wax and wane depending on the circumstances.[192]

The second point of uncertainty is the word 'relevant'.[193] Previous decisions have held that a particular right is relevant where it is reasonably foreseeable that the decision might limit or interfere with the right.[194] For example, in *Castles*, the Secretary of the Department of Justice had to decide whether to issue Ms Castles with a permit to leave prison and access in vitro fertilisation treatment.[195] Not issuing the permit would limit Ms Castles' right to humane treatment while in detention under s 22(1) of the *Charter*.[196] Therefore, this right was relevant to the Secretary's decision.[197]

It is unclear how Bare's express rights under ss 8(3) and 10(b) of the *Charter* met this test of relevance. Santamaria JA merely stated that it was 'obvious' that those rights were relevant.[198] Warren CJ and Tate JA suggested that, if the delegate decided not to investigate Bare's complaint, this would 'continue to interfere with'[199] or 'further aggravate the interference with'[200] Bare's rights. But this proposition seems difficult to reconcile with their Honours' finding on the implied right issue. If Bare had no *Charter* right to an independent investigation, a decision not to investigate could not interfere with his *Charter* rights.

The ss 8(3) and 10(b) rights might have been relevant to the delegate's decision in a different, indirect way. If Bare's allegations were true, the relevant police officers were an ongoing threat to public safety.[201] Their conduct also raised the possibility of a systemic issue in the police force.[202] A decision not to investigate might thus interfere with the general public's enjoyment of these

192 See, eg, *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 241 (Wilcox J).

193 I am grateful to one of the anonymous referees for pressing me on this point.

194 See, eg, *Castles* (2010) 28 VR 141, 166 [94], 172–3 [123]–[124], 182 [173], 183 [178] (Emerton J); *Patrick's Case* (2011) 39 VR 373, 423–4 [229]–[231] (Bell J). In the more recent decision of *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111 (22 March 2016) [102], Riordan J took the same approach: 'Human rights will be relevant if the proposed decision will apparently limit such rights.'

195 (2010) 28 VR 141, 149 [18], 152 [31].

196 Ibid 166–70 [93]–[113], 182 [173] (Emerton J).

197 Ibid 183 [178].

198 *Bare* (2015) 326 ALR 198, 344 [538].

199 Ibid 257 [221] (Warren CJ).

200 Ibid 279 [296] (Tate JA).

201 See ibid 257 [221] (Warren CJ).

202 Ibid 257 [223].

rights in the future. But this argument conflicts with the Court's emphasis that the delegate failed to give proper consideration to Bare's relevant rights.[203]

Warren CJ and Tate JA held that, even though the implied right did not exist, the delegate should have considered Bare's argument on this point.[204] Again, it is unclear how the implied right was relevant within the meaning of s 38(1), given the Court's conclusion that it was not a 'human right' for the purposes of the *Charter*.[205]

Future decisions must clarify the test for relevance under s 38(1) of the *Charter*. Otherwise, public authorities will be uncertain about which rights to consider as part of the evaluative *Castles* approach.

VII The Remedy Issue

A *Background*

The final issue addressed by Tate JA and Santamaria JA was whether Bare was entitled to a remedy. Warren CJ was not required to address this issue, given her Honour's other findings.

As noted in Part IV above, the precise operation of the *Charter*'s remedial scheme is unclear. To seek relief for *Charter* unlawfulness, a person must establish that, independently of the *Charter*, he or she 'may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful'.[206] The courts have not yet decided between the 'abstract availability' and the 'factual availability' interpretations of s 39(1).[207]

B *Tate JA and Santamaria JA's Reasoning*

Tate JA and Santamaria JA held that Bare was entitled to an order in the nature of certiorari quashing the delegate's unlawful decision. This conclusion flowed from the following propositions. First, the delegate's letter to Bare's solicitor showed that his decision was made without giving proper considera-

[203] Ibid 257 [222] (Warren CJ), 278–9 [293]–[296] (Tate JA), 345 [539] (Santamaria JA).

[204] Ibid 257–8 [224] (Warren CJ), 279–80 [297]–[298] (Tate JA).

[205] Ibid 256 [215] (Warren CJ), 327 [457] (Tate JA), 390 [665]–[668] (Santamaria JA).

[206] *Charter* s 39(1).

[207] See *Bare* (2015) 326 ALR 198, 309–10 [394]–[396] (Tate JA); Moshinsky, above n 72, 96.

tion to Bare's relevant human rights.[208] Second, by operation of s 38(1), this decision was unlawful.[209] Third, certiorari will lie to quash an error of law that appears on the face of the record, whether or not the error is jurisdictional.[210] Fourth, according to the *Administrative Law Act*, 'the record' includes the reasons, oral or written, of any 'tribunal or inferior court'.[211] A 'tribunal' is a decision-maker required by law to observe 'one or more of the rules of natural justice'.[212] Fifth, the delegate was a 'tribunal', because he was required by law to observe at least one of the rules of natural justice.[213] Therefore, the delegate's error of law lay on the face of the record, and his decision was open to be quashed by certiorari.[214] The Court also made declarations to that effect, and Bare's matter was remitted to the Independent Broad-Based Anti-Corruption Commission for it to make a fresh decision.[215]

Tate JA and Santamaria JA did not refer to s 39(1) of the *Charter* in their analysis of the remedy issue.[216] Their Honours appeared to apply the 'factual availability' interpretation. At first instance, Bare sought relief on several common law grounds, in addition to his *Charter* grounds.[217] Williams J rejected Bare's common law grounds,[218] and they were not raised in the Court of Appeal.[219] This was apparently sufficient to satisfy the condition in s 39(1) of the *Charter*.

Given the confusion surrounding the *Charter*'s remedial scheme, it would have been of assistance if Tate JA and Santamaria JA had set out clearly how s 39(1) entitled Bare to the relief he sought. As noted in Part IV above, Santamaria JA implicitly rejected the 'abstract availability' interpretation in

[208] *Bare* (2015) 326 ALR 198, 278–81 [293]–[301] (Tate JA), 344–5 [538]–[541], 351–2 [558] (Santamaria JA).

[209] See above Part VI.

[210] *Bare* (2015) 326 ALR 198, 289 [328] (Tate JA), 352 [560] (Santamaria JA).

[211] *Administrative Law Act* s 10.

[212] Ibid s 2 (definition of 'tribunal').

[213] *Bare* (2015) 326 ALR 198, 289 [328] (Tate JA), 353 [564]–[566] (Santamaria JA).

[214] Ibid 289–90 [328]–[329] (Tate JA).

[215] Ibid 290 [329] (Tate JA), 354 [569] (Santamaria JA). The Independent Broad-Based Anti-Corruption Commission is the successor to the OPI: see ibid 200 [1] n 1 (Warren CJ).

[216] Ibid 289–90 [328]–[329], 328 [460]–[463] (Tate JA), 352–4 [560]–[569] (Santamaria JA).

[217] *Small* [2013] VSC 129 (25 March 2013) [38].

[218] Ibid [170]–[185].

[219] *Bare* (2015) 326 ALR 198, 220–1 [71].

his Honour's analysis of the jurisdictional error issue.[220] Tate JA declined to decide whether that interpretation was open.[221]

C *Analysis*

The outcome in *Bare* illustrates the potential for litigators to harness the *Administrative Law Act* when bringing claims under the *Charter*. First, the *Administrative Law Act* permits a court to examine a wider range of material to see whether a public authority has failed to give proper consideration to human rights in making a decision. Provided that the public authority is required to observe the rules of procedural fairness,[222] its reasons are incorporated into the record for the purposes of any application for judicial review.[223] Without the *Administrative Law Act*, the record would be restricted to the documents which initiated the proceedings and the tribunal's order.[224] If a public authority's reasons show that it failed to give proper consideration to human rights, then certiorari is available (subject to s 39(1)) to remove the legal consequences of the decision.[225]

Second, the *Administrative Law Act* confers on any person affected by a tribunal's decision a right to request a statement of reasons.[226] Litigators might then use a statement of reasons, as in *Bare*, as a springboard for review for *Charter* unlawfulness.

As noted above, the decision in *Bare* did not clarify the precise operation of s 39(1). This continuing uncertainty may be resolved by Parliament, following the Victorian Government's 2015 Review of the *Charter*.[227] The Review recommended that s 39 be amended to permit judicial review on *Charter* grounds alone.'[228] The Victorian Government has responded

[220] Ibid 373 [625].

[221] Ibid 310 [396]–[397].

[222] *Administrative Law Act* s 2 (definition of 'tribunal').

[223] Ibid s 10; Matthew Groves, 'Should the *Administrative Law Act 1978* (Vic) Be Repealed?' (2010) 34 *Melbourne University Law Review* 452, 455.

[224] *Craig v South Australia* (1995) 184 CLR 163, 180–2.

[225] *Wingfoot* (2013) 252 CLR 480, 492 [25]–[26].

[226] *Administrative Law Act* s 8.

[227] Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (Report, Department of Justice and Regulation (Vic), 1 September 2015) 120–1 <https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>.

[228] Ibid 133.

(somewhat cryptically) that this recommendation is 'supported in principle, but remains under further consideration'.[229] The future of s 39 hangs in the balance.

VIII Conclusion

Bare is one of the most significant decisions in the *Charter*'s brief history.[230] The decision has important implications for litigators seeking to use the *Charter* to hold public authorities to account for human rights breaches. On the positive side, *Bare* demonstrates the *Charter*'s power to have a normative influence on the behaviour of government decision-makers, by requiring them to give proper consideration to human rights. The decision also highlights how the *Charter* can be used in concert with the *Administrative Law Act* to bolster claims for judicial review on human rights grounds. On the negative side, the Court of Appeal sounded a warning to those seeking to use international law in *Charter* litigation. If Victorian human rights law is to keep pace with its international counterparts, litigators will need to be astute in their use of international materials in future.

[229] Department of Justice and Regulation (Vic), *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* (22 July 2016) <http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/human+rights+legislation/government+response+to+the+2015+review+of+the+charter+of+human+rights+and+responsibilities+act>.

[230] (2015) 326 ALR 198.